80-1107

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIAM CAULFIELD, et al.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, IRVING ANKER, JOSEPH CALIFANO, JR., DAVID TATEL, RONALD ROSS, THE COALITION OF CONCERNED BLACK EDUCATORS, and GORDON AMBACH,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

(1) Did the Court of Appeals err in affirming the District Court's dismissal of appellants' case on the ground

that in its present posture, the case does not present a "case or controversy" under Article III of the Constitution?

(2) Did the Court of Appeals err in holding that the Department of Health, Education and Welfare ("HEW") has jurisdiction under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 to investigate the Board of Education's teacher and supervisor employment practices and to seek compliance with the provisions of these statutes?

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REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record raises the questions presented in the petition.

The petition presents the following questions:

> 1. Did the federal Department of Health, Education and Welfare ("HEW"), and its Office for Civil Rights ("OCR"), have jurisdiction to require the Board of Education of the City of New York ("the Board"), to agree in a Memorandum of Understanding to hire and to assign teachers on the basis of their race to conform to racial quotas prescribed in such Memorandum of Understanding, where the primary objective of federal financial assistance to the Board was to provide aid to education, and not to provide employment?
>
> 2. In the absence of a finding that the Board intentionally discriminated racially against Black and Hispanic teachers and applicants for employment as teachers, did the Memorandum of Understanding between OCR and the Board, and the Board's

> actions in carrying out its provisions, unconstitutionally deny to the plaintiffs the equal protection of the laws, and deprive them of liberty and property without due process of law, by reverse racial discrimination?
>
> 3. Did the Board's annual racial census of teachers unconstitutionally invade the privacy of teachers, and deprive them of liberty and property without due process of law?

None of the questions cited above were decided by the Second Circuit in its decision in this case filed on September 22, 1980. Moreover, the record in this case will not support a determination of these questions by this Court.

Jurisdiction

(1) In the first part of its opinion, entitled "Jurisdiction," (Pet. 9a), the Second Circuit held that "Title VI enforcement procedures apply to the Board's teacher hiring and assignment practices and

that HEW therefore had jurisdiction to investigate and seek compliance."

Not only was there no finding that OCR "required" the Board of Education to agree to the terms of the Memorandum of Understanding, but both the District Court and the Circuit found that the Memorandum was voluntary. Also, neither the District Court nor the Circuit Court found any of the provisions in the Memorandum to constitute "racial quotas."

The Absence of a Finding of Intentional Discrimination

(2) In the second part of its opinion, entitled "teacher assignment," (Pet. 11A-14A), two of the three judges hearing this case in the Circuit held that appellants' challenge of the assignment remedy required by the Memorandum failed, on the record presented, to allege any harm

amounting to violation of a federally protected right, and never even reached the issue of whether the race-conscious remedies provided for in the Memorandum can be upheld in the absence of a prior finding of intentional discrimination.

In Part 3 of its opinion, entitled "hiring goals," (Pet. 14a-15a), the Second Circuit held that appellants

> "claim that the Board will use race as a factor in its hiring decisions is, on this record, purely conjectural and therefore does not amount to a 'case or controversy' under Article III of the Constitution. No teacher has alleged that the Memorandum has affected the consideration of his job application. Appellant has not demonstrated, as he must, that the threatened injury of which he complains is 'real and immediate," rather, it is 'conjectural' and 'hypothetical."

Because the record was found deficient in these respects, the Second Circuit

did not reach the second question presented by appellants, the issue of whether the absence of a finding of intentional discrimination invalidates the Memorandum.

Ethnic Census

(3) The Second Circuit decision which appellants are asking this Court to review made no findings with respect to the Board's collection of statistics on the ethnic and racial composition of the teaching staff. In Caulfield I, 583 F. 2d 605, (2d Cir., 1978), the Second Circuit held that the District Court "did not abuse its discretion in refusing to halt the collection of ethnic data on teachers and supervisors," (Pet. 18A), and affirmed the District Court's order of February 24, 1978, denying plaintiffs' application for an injunction against the collection of such data. In affirming the

District Court's order in the prior proceeding, the Circuit noted that "since appellants neither presented nor sought to present any evidence in support of their motion for a preliminary injunction, all that the district court had before it was a question of law." (Pet. 23A)

Upon the remand of this case to the District Court for a trial on the merits, appellants failed to introduce any evidence whatsoever on the racial census conducted by the City School system, and accordingly, the Circuit, in the decision which appellees seek review, made no findings on this issue. For this reason, we respectfully submit that the question of the alleged harm caused by the racial census is not properly before this Court for review.

CONCLUSION

This is a case of a record that fails to demonstrate any invasion of petitioners' constitutional or statutory rights and therefore the petition for a writ of certiorari should be denied.

Respectfully submitted,

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